

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
ASHEVILLE DIVISION  
CRIMINAL CASE NO. 1:07-cr-00036-MR**

<b>KEVIN MICHAEL LEITE,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	<b><u>MEMORANDUM OF</u></b>
<b>vs.</b>	)	<b><u>DECISION AND ORDER</u></b>
	)	
<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Respondent.</b>	)	
<hr/>	)	

**THIS MATTER** is before the Court on a review of the Petitioner’s “Motion for Post-Conviction Relief Pursuant to Johnson v. United States, 576 U.S. \_\_\_, 135 S. Ct. 2551 (2015).” [Doc. 32]. For the reasons that follow, Petitioner’s motion will be treated as a successive § 2255 motion and will be dismissed.

**I. BACKGROUND**

The Petitioner pleaded guilty to two counts of possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) (Counts One and Six); one count of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count Three); and one count of possession of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count Five). On

March 28, 2008, the Court sentenced him to a term of 120 months' imprisonment for Counts One and Six, a term of 262 months' imprisonment for Count Three, to be served concurrently with Counts One and Six; and a term of 60 months' imprisonment for Count Five, to be served consecutively to the terms imposed for Counts One, Three, and Six, for a total of 322 months' imprisonment on March 28, 2008. [Doc. 17]. The Petitioner did not file a direct appeal.

On April 26, 2010, the Petitioner filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. [Doc. 21]. On August 9, 2010, the Court dismissed the Petitioner's § 2255 motion as untimely. [Doc. 22].

The Petitioner now seeks a motion for relief under the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). In his motion, the Petitioner requests that the Court not construe his motion as a motion filed pursuant to 28 U.S.C. § 2255, but rather only as "a motion for relief under Johnson." [Doc. 32 at 1].

## **II. DISCUSSION**

The relief sought by Petitioner in the present motion is relief he could obtain only through a successful § 2255 proceeding. Accordingly, the Court must treat his motion as a successive motion brought pursuant to § 2255.

See Gonzalez v. Crosby, 545 U.S. 524, 531, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005); United States v. Winestock, 340 F.3d 200, 206-07 (4th Cir. 2003).

The Antiterrorism and Effective Death Penalty Act (“AEDPA”), as codified in 28 U.S.C. § 2255, provides that a “prisoner in custody under sentence of a court established by Act of Congress . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a). The AEDPA, however, provides a specific limitation on a prisoner’s ability to bring a second or successive motion under § 2255. Specifically, the AEDPA provides, in pertinent part, as follows:

A second or successive motion [under Section 2255] must be certified as provided in Section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

The Petitioner has not provided any evidence that he has secured authorization from the Fourth Circuit to file a successive § 2255 motion.

Therefore, this Court is without jurisdiction to consider the merits of the present § 2255 motion and it will be dismissed.

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, the Court declines to issue a certificate of appealability as the Petitioner has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 473, 484 (2000) (holding that when relief is denied on procedural grounds, a petitioner must establish both that the correctness of the dispositive procedural ruling is debatable, and that the petition states a debatably valid claim of the denial of a constitutional right).

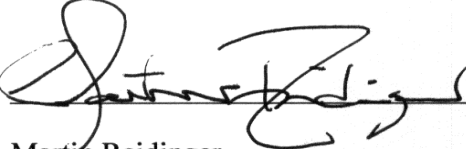
### **ORDER**

**IT IS, THEREFORE, ORDERED** that the Petitioner's "Motion for Post-Conviction Relief Pursuant to Johnson v. United States, 576 U.S. \_\_\_, 135 S. Ct. 2551 (2015)" [Doc. 32] is **DISMISSED** as an unauthorized, successive § 2255 motion.

**IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, the Court declines to issue a certificate of appealability.

**IT IS SO ORDERED.**

Signed: June 9, 2016

  
Martin Reidinger  
United States District Judge

